

THREATS TO JUDICIAL INDEPENDENCE AND THE RULE OF LAW

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I want to thank Judge Lamberth for that generous introduction. Royce and I have been friends since our days as Assistant U.S. Attorneys together over 45 years ago. Tom Flannery hired me as an Assistant and, though Royce came later, Tom always considered him an honorary Flannery era Assistant. We also both had the privilege of serving with Judge Flannery on this Court, Royce far longer than I. And for more than a decade, we have served with Roger Zuckerman and other former Flannery Assistants and law clerks on the Flannery Lecture Committee. Tom Flannery instilled within all of us who worked with him in whatever capacity a sense of fairness, justice, and decency, and the imperative of treating all persons in the system with respect.

Over the years, the Flannery Lecture has been graced by a series of wonderful, sometimes inspirational and often provocative speakers. Our very first Flannery Lecture was given by Judge Lamberth, who spoke about the nomination and confirmation process for federal judges. He said the system was badly broken, and he advocated making it less partisan and more civil. That was a decade ago. So you can see how influential these Flannery lectures have been! Two years ago, then Deputy Attorney General Rod Rosenstein, who is here today, was our speaker. He spoke about the rule of law, Attorney General Robert Jackson's well-known admonition to federal prosecutors about their proper role, and the integrity of the Department of

Justice. I want to pick up where Rod left off. My topic today is “Threats to Judicial Independence and the Rule of Law.”

As every lawyer and political science major knows, one of the great contributions our Constitution has made to constitutional democracy is the idea of separation of powers. To the bifurcated government of the British model, the Framers added a third co-equal branch of government – the Judicial Branch. The Framers were particularly concerned about guarding against a too powerful Legislative branch, not an overreaching Executive. They also wanted to ensure that the rights of the minority were protected against a tyranny of the majority. Their answer was to provide for an independent federal judiciary that would keep the other two branches in check. The Framers believed an independent judiciary was central to a republican form of government and “critical to fairness and impartiality.” And to assure such judicial independence, they provided in the Constitution itself that federal judges would be appointed for life – technically, for good behavior – that Congress could not reduce the compensation of federal judges, and that judges could only be removed from office by impeachment – and only then for high crimes and misdemeanors. In other words, they created a federal judiciary that was immune, by and large, from political pressure.

In Federalist No. 78, Alexander Hamilton called the judiciary “the least dangerous” and weakest branch, because it held neither the purse strings of the Legislature nor the force of the Executive; the judiciary wielded “merely judgment,” he wrote. So it had to be protected from outside influence by providing safeguards to its independence. Importantly, Hamilton also said in Federalist No. 78 – presaging Chief Justice John Marshall in Marbury v. Madison – that it was “the duty of the courts to declare all acts contrary to the manifest tenor of the Constitution void.” The judiciary would protect the guarantees set out in the Constitution by having the power to say “no” to the Legislature and “no” to the Executive when they overstepped

the limits of their constitutional powers. And as Chief Justice William Rehnquist later observed: “The Constitution tries to insulate judges from the public pressures that may affect elected officials. The Constitution protects judicial independence not to benefit judges, but to promote the rule of law.”

But what specifically do we mean when we talk about judicial independence? It certainly does not mean lack of accountability to the laws written by Congress. Clearly, at the trial court level we federal district court judges are not free agents, as we are so often reminded by the courts of appeals as they review our decisions. Judges must follow the law, the Constitution and precedent, not our own political or philosophical predilections. We are expected to approach each case with an open mind and render unbiased judgments; we must be impartial and non-partisan. Judicial independence consists of the “intellectual honesty and dedication to [the] enforcement of the rule of law regardless of popular sentiment,” and the ability “to render a decision in the absence of political pressures and personal interests.” Chief Justice Rehnquist called judicial independence “one of the crown jewels of our system of government today.”

In contrast to the institutional independence guaranteed to federal judges by the Constitution, most state court judges are not so insulated from outside pressures. We in the District of Columbia are fortunate to have a merit selection system that has produced one of the finest state level court systems in the country. But today in 38 states, state court judges are elected, “a practice that is virtually unknown to the rest of the world.” And because of Supreme Court decisions like Citizens United and Republican Party of Minnesota v. White, many are elected in heavily financed, often vitriolic campaigns – campaigns that literally invite pandering to special interests and portend built-in conflicts of interest once judges reach the bench. Not to mention the tenor of the campaigns themselves! All of this led Justice Sandra Day O’Connor to

say that “the single greatest threat to judicial independence . . . is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections.” Margaret Marshall, former Chief Justice of the Supreme Judicial Court of Massachusetts, put it this way: “When judges have to look over their shoulders before deciding a case – or worse, when they make an implied promise to look over their shoulder before deciding a case – when litigants enter the courtroom hoping their attorney has contributed enough to a judge’s election coffers, we are in trouble, deep trouble.”

In the introduction to their recent book, “Tough Cases,” my friends Judges Russ Canan, Greg Mize and Fred Weisberg wrote that judging high profile, sometimes highly politicized cases “can be especially challenging for elected judges, who know that whatever decision they make may become fodder for an opposition campaign when they next stand for election, and may ultimately cost them their judgeship.” Nonetheless, they say, “these political realities do not lessen a judge’s duty to decide each case in accordance with the facts, the rule of law, and by reference to neutral principles.” And my friend Chief Justice Nathan Hecht, who has been elected to the Supreme Court of Texas six times, said in his Brennan Lecture at New York University Law School: “Judges have no constituencies. They account to the people for their adherence to the rule of law. When judges follow the law, even against the popular will of the time – especially against the popular will of the time – they have done their job. . . . But when accountability is measured by whether a judge decides cases the way people like, and [when] what people like is different from what the law is, the pressure is on the judge to surrender independence, and the law, to popular will.” When judicial accountability turns on whether a judge’s decisions are or will be popular, he continued, “judicial independence is threatened.”

Just two weeks ago, David Levi, former Dean of Duke Law School and current President of the American Law Institute, addressed the many negative aspects of electing judges

when he spoke at a symposium sponsored by the Rendell Center for Civics and Civic Engagement in Philadelphia. Dean Levi pointed to academic studies that demonstrate that judges facing re-election in fact will be affected in their judicial decisions in the time period running up to the election. He said: “State trial judges sentence more severely, appellate judges are less likely to overturn a conviction, and Supreme Court Justices are less likely to overturn a death penalty. [Furthermore,] partisan judicial elections are utterly inconsistent with our effort to convince the public that our judges are not partisan. . . .”

Chief Justice Hecht and Dean Levi’s concerns are borne out by what we see today in so many states. Campaigns for judicial office are getting more and more expensive. As of January 2017, one-third of all judges or Justices sitting on our states’ highest courts have run in one million dollar-plus elections, and there has been a spike in the involvement of well-financed interest groups and the spending of so-called “dark money” in state judicial elections since Citizens United. As Justice O’Connor put it when discussing Caperton v. Massey Coal: “If I knew that I was litigating before a judge who received that kind of money from my opponent, I would not think I was getting a fair shake.” My own very limited experience in the state trial courts as a practicing lawyer included a corporate takeover case in which – after defeating a motion in federal court in Ohio to enjoin a crucial shareholders meeting and vote on corporate control – I was advised by phone that a state court judge in the 162nd District Court in Dallas, Texas had entered an ex parte order restraining the convening of that very same shareholders meeting. After a late night flight to Dallas for a morning argument seeking to set aside the restraining order, I found that the judge was unwilling to hear argument from counsel until his former campaign manager had arrived. The campaign manager literally sat in the jury box shaking his head yea or nay toward the judge while we presented our arguments. I suspect that too many lawyers in this room could cite equally disturbing tales.

But the argument that state legislators and politicians make for electing judges is, on its face, an appealing one: Judges should be responsive to the values and preferences of the citizens in their states, just as governors and legislators are. Not only does this misapprehend the judicial function, but it often masks a more insidious goal: the opportunity for special interests to help elect judges who will do their bidding, or be susceptible to influence, or act in desired ways at desired times. These politicians simply do not accept the notion that the Framers enshrined in the federal Constitution: whether elected or appointed, a judge must be responsive only to the laws, to judicial precedents, and to federal and state constitutions.

Unfortunately, it appears that the public increasingly, and mistakenly, has appropriated that view. One recent poll found that nearly 90 percent of voters believe that campaign contributions play a role in how state judges decide cases. In recent years, there also have been a number of sometimes successful efforts to impeach or recall state court judges because of disagreements with their decisions or judicial philosophy. Increasingly, citizens are more distrustful than ever of decisions by state court judges, less likely to believe that the judges act impartially, and more likely to think they are “just politicians in black robes.” Certainly in public perception – and maybe to a certain extent in reality – we have a less independent, less neutral and potentially more partisan state judiciary than ever before.

But to my colleagues on the federal bench, I say we cannot sit back smugly and think we are immune from this public reaction to and perception of courts and judges. We are not. Despite the independence the Constitution has provided to federal judges to insulate us from similar outside pressures, many people nevertheless now believe that federal judges, too, decide cases in accordance with their political preferences or party affiliations. Nearly two-thirds of respondents in a Harvard CAPS/Harris poll in 2018 said they thought decisions of federal judges are “influenced by politics” and that our rulings are based “more and more on [our] political

views.” Only 34 percent now believe that federal judges act independently and issue rulings based on the law as written, and 55 percent of the American people believe that the Supreme Court is motivated by politics. And to cite one unfortunate trend that corroborates this, it is now routine for the press in reporting on judicial decisions to identify the president – or at least the party of the president – who nominated the judge or judges who decided the cases. In reading the newspaper, I sometimes think “Clinton-judge” is a part of my name.

Some of us are old enough to remember “impeach Earl Warren” bumper stickers, Congressman Gerald Ford’s efforts to impeach Justice William O. Douglas, and other attacks on the so-called “activist” Warren court. Indeed, the terms “activist judge,” “liberal activist judge,” and “soft on crime” continue to be used as pejoratives. Some of us remember Congressman Tom DeLay criticizing an elected state court judge, Judge George Greer, in the Terry Schiavo case, calling him a terrorist and murderer and a symbol of “an arrogant, out of control, judiciary,” a judiciary which “thumbed its nose at Congress and the President.”

But what is so troubling today is that such personal and caustic attacks on judges are on the rise. The attacks are better organized, more partisan, more vitriolic, often extremely heavily financed, and more purposefully misleading than ever before. And – with social media like Twitter – the attacks are instant, widespread, and often rapidly “retweeted” to thousands of people. What should concern us all is not when politicians, government officials, and the press express their disagreements with judicial decisions, but when they attack the integrity and motives of the judges who have issued those decisions, attempting to paint them as partisan or political. These personal attacks undermine public confidence in the courts, endanger judicial independence, and ultimately may undermine faith in the rule of law itself.

This obviously is a trend we’re seeing throughout public life, but, I would suggest, the stakes in attacking the judiciary have graver implications. And regrettably, the current

President of the United States is feeding right into this destructive narrative. We are in uncharted territory. We are witnessing a chief executive who criticizes virtually every judicial decision that doesn't go his way and denigrates judges who rule against him, sometimes in very personal terms. He seems to view the courts and the justice system as obstacles to be attacked and undermined, not as a co-equal branch to be respected even when he disagrees with its decisions.

Now I know that President Trump is not the first president to be frustrated with judicial outcomes and to respond by attacking judges personally. Thomas Jefferson accused the courts of being politically motivated, ambitious and subject to outside influences. His proposed solutions: to elect federal judges so they would be directly answerable to the people, and to impeach Supreme Court Justice Samuel Chase, who had implicitly criticized Jefferson during a grand jury proceeding. Theodore Roosevelt railed against Justice Oliver Wendell Holmes, and President Eisenhower called Chief Justice Earl Warren the biggest mistake he had ever made. Then there was Franklin Roosevelt, who tried to pack the Supreme Court with six additional Justices whom he thought he could count on to vote his way on New Deal legislation – a bad idea then and a bad idea now. And during his campaign for re-election, President Bill Clinton called U.S. District Court Judge Harold Baer's suppression of evidence in a notorious drug case "grievously wrong" and called on Judge Baer to resign or, if he did not, to face impeachment. The President retreated within a few days – not from criticizing the substance of Judge Baer's decision, but from calling for retribution. And President Obama, in my view, surely chose an inappropriate forum in which to criticize the Supreme Court's decision in Citizens United by doing so at the televised State of the Union address, with members of the Supreme Court – a captive audience – sitting directly in front of him.

And yet, what we are witnessing today and over the last few years is markedly

different. Let me refresh your recent memory. As a candidate, Donald Trump accused U.S. District Court Judge Gonzalo Curiel of being biased against him and against Trump University because of the judge's Mexican heritage and because he was appointed by President Obama. Trump called the judge "a hater of Donald Trump," demanded that Judge Curiel recuse himself, and said that someone "ought to look into" Judge Curiel – whatever that means! His introduction of such personal ad hominem attacks against the judge set a terrible precedent and encouraged others to join the chorus. This was beyond a dog whistle. This was a shout.

Things only accelerated after the election. When Judge Richard Seeborg enjoined the Administration's program to make asylum seekers at the southern border wait in Mexico as they are processed because the judge found that it violated both the Immigration and Nationality Act and the Administrative Procedure Act, President Trump called this the "tyranny of the judiciary." He called Judge William Orrick's decision on sanctuary cities a "gift to the criminal gang and cartel element in our country." When Judge James Robart in Seattle enjoined the Administration's first travel ban, President Trump referred to him as a "so-called judge," who is "taking law enforcement away from our country." And when the Ninth Circuit affirmed Judge Robart, President Trump called the appellate decision "disgraceful" and "political." Ninth Circuit Judge Jay Bybee – appointed to the bench by President George W. Bush – dissented from his court's opinion affirming Judge Robart's travel ban decision. While he disagreed with his colleagues on the merits and would have upheld the travel ban, Judge Bybee wrote: "Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise and even intimidation are acceptable principles. The courts of law must be more than that, or we are not governed by law at all."

When the Administration issued a Presidential Proclamation and published a Rule suspending the entry of any alien coming across the border from Mexico not through a

designated port of arrival – thus denying individuals the right to even seek asylum – Judge Jon Tigar enjoined the Rule’s enforcement and ordered the Administration to resume accepting asylum seekers no matter where or how they entered the United States. President Trump attacked him as “an Obama judge” and called his decision “a disgrace.” The Ninth Circuit also affirmed that decision. Judge Bybee wrote the following for a unanimous three-judge panel: “Here, the Executive has attempted an end-run around Congress. . . . The Proclamation . . . [i]n combination with the Rule . . . does indirectly what the Executive cannot do directly: amend the [Immigration and Nationality Act]. Just as we [judges] may not, as we are often reminded, ‘legislate from the bench,’ neither may the Executive legislate from the Oval Office.” Each of the three co-equal branches, he implied, must stay in its own lane.

Finally, with respect to litigation challenging his emergency declaration respecting the border wall, the President predicted adverse rulings in the district courts and in the Ninth Circuit. He called the Ninth Circuit “a complete and total disaster, . . . out of control.” But, he said, “hopefully we’ll get a fair shake” in the Supreme Court; in fact, on one occasion, he said, “we’ll win in the Supreme Court,” perhaps to suggest that he expects the five Justices appointed by Republican presidents invariably will vote to uphold decisions made by his Administration. “If it’s my judges,” he said during the campaign, “you know how they’re going to decide.” This is not normal. And I mean that both in the colloquial sense and in the sense that this kind of personal attack on courts and individual judges violates all recognized democratic norms.

But the good news is that most judges and the Justices of the Supreme Court fully understand that they are not beholden to – and cannot be counted on – to please “the home team,” as it were. Chief Justice John Roberts, in a welcome response to all of this a year ago this month, reminded the President that the United States does not have “Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated

judges doing their level best to do equal right to those appearing before them.” The Chief Justice added: “That independent judiciary is something we should all be thankful for.”

The reality is that when the Trump Administration has lost cases in the courts, it is not because of Clinton or Obama judges, but because of judges who are trying to follow the law and the Constitution. Four judges rejected the Administration’s position on the termination of the Deferred Action for Childhood Arrivals program or DACA; at least three ruled against its efforts to end the legal status of immigrants in the United States under temporary protected status; and seven found illegal the Administration’s attempt to cut off funds for sanctuary cities. Many of these cases involved challenges to Trump Administration regulatory decisions under the Administrative Procedure Act – a statute with which judges in this building are very familiar. Indeed, the Institute for Policy Integrity at N.Y.U. has found that the Trump Administration’s success rate in APA cases is only about six percent; historically, the success rate of the government in APA cases has been about 70 percent. Why? Not because the courts believe the Administration is prohibited by law from issuing new regulations or rescinding or modifying existing ones, but because courts have found that the Administration has short-circuited the statutory requirements of notice and comment or has failed adequately to explain its reasoning. And these adverse decisions have come not just from judges appointed by Democrats, but by Republican appointees as well – including some appointed by President Trump himself.

I do not think I am naïve or Pollyannaish. But after 25 years as a practicing lawyer observing judges in action and then 25 years on the bench, I do believe that most federal judges, whatever their political backgrounds, take their oaths of office seriously and understand that they are not legislators or policymakers – even those who used to be in the political arena. As U.S. District Judge John Jones put it: When judges seem to follow their own path after they take the bench – not that of their political party or the president who appointed them – “it’s not

that we're going rogue; we're deciding cases according to the law." Judges understand that we are meant to operate under significant constraints and that our personal opinions, our philosophy, our politics, our religious views are not relevant.

I turn here to something Judge Flannery said in his oral history 25 years ago. He was asked about his rulings in certain civil liberties cases, including one involving the so-called "squeal rule" for abortions. Judge Flannery said: "I am guided by the opinions of the higher courts, the court of appeals and Supreme Court. I might disagree with an opinion of a higher court, but under my oath as I understand it, I don't make the law; I follow the law, and interpret the law. I might not be sympathetic to a particular litigant's theory, but I apply existing law until a higher court or the Legislature changes it. . . . Because of my Catholic upbringing and background, I personally disagree with those who advocate unrestricted birth control and abortions. That wouldn't stop me from following the law as laid down by a higher court, although it might be different from my personal beliefs. I think you have to divorce your personal beliefs and views from what the law requires."

So Judge Flannery was not a Catholic judge or a Nixon judge – nor am I a Clinton judge, Judge Lamberth a Reagan judge, or my four new colleagues Trump judges. But what matters today is that larger and larger segments of the public no longer believe this to be true, and people are increasingly skeptical of the notion that judges are not just partisans in robes. This matters not just because justice must be done and precedent followed without fear or favor, but because "public confidence in the judicial branch is imperative to the proper functioning of government." The public must perceive that we are fair and impartial if the rule of law is to survive.

Now I said earlier that I was not naïve or Pollyanish, but you might think I am given what you may see as the idyllic, unbiased, open-minded state of the federal judiciary I

seem to be describing. Rest assured, I am well aware of the increasing politicization surrounding the appointment and confirmation of federal judges, with debate on the Senate floor limited to two hours, the elimination of the Blue slip, the change in the traditional role played by the American Bar Association, and way too many strictly party line votes on judicial nominees. But I'm afraid that is a speech for another day – or the time for Judge Lamberth to update his remarks from ten years ago. Despite all the controversy on that front, however, I continue to believe deeply in the integrity and independence of my colleagues appointed to the federal bench in the past, as well as those appointed in today's more partisan climate.

To return to my theme for today – the foundational importance of an independent judiciary: In the past when I have addressed this issue, I have said it is very difficult for judges themselves to speak out and that we should refrain, leaving it to lawyers and the organized bar to come to our defense. After all, the burden of “zealously guarding judicial independence” – Justice Brennan's words – falls largely to the legal profession: practitioners whether in large practices or small, academics, and the organized bar. These are important stakeholders in an independent judiciary – and you are the ones who need to speak up! My friend Dean Levi underscored that point when he said: “Our bar associations should realize that one of the main reasons lawyering is a profession is precisely so that an independent bar may defend the independence of the judiciary.”

But because of the recent history I have recited, and the trends and media messages that so clearly are having a dramatic impact on the public's perception of the legitimacy of the courts, I now believe that judges, too, must add their voices. If we are to assure that the courts remain independent from politics and from other outside influences – and, as importantly – that they are perceived that way by the public – then judges, by definition the guardians of the rule of law, must participate more visibly and vocally. Justices Sonia Sotomayor

and Neil Gorsuch concur. Just last Thursday, at an event sponsored by the Second Circuit Committee on Civic Engagement, the two Justices agreed that judges today have a special role to play in educating our fellow citizens about the work of the courts. Justice Gorsuch said: “I think our ethical rules not just permit, but encourage, judges to participate in advancing rule-of-law initiatives and advancing understanding of the law.” And Justice Sotomayor said: “We are the best ambassadors of the work we do, and explaining our process to the population is what will keep us supported by our population. If we don’t educate, we stand to be continuously assaulted.”

But what is the way forward? Texas Chief Justice Hecht has observed: “[J]udicial independence is not really understood, especially in a culture as lacking in civics education as ours.” Civics Education: an incontrovertible path, by way of our educational system and our social culture at large, to help educate and alert our citizens, particularly the non-lawyers, to the principles I have been discussing today. Justice O’Connor, who is passionate about this issue, has said that the root of the problem is “ignorance about the role of the judiciary.” Indeed, a very recent poll found that the more knowledge and awareness citizens have about the Constitution and the Supreme Court, the more Americans across the political spectrum view the Court favorably. So perhaps one long-term means of addressing our problem is a renewed emphasis on civics education – for children, voters, policy makers, and lawyers – about how crucial a fair, impartial, and independent judiciary is to our democracy.

Justice Gorsuch also said last week that “we are facing [another] crisis. . . . We have lost the art of how to talk to one another.” The aggressiveness, coarseness and vitriol of some of the attacks on the judiciary and its independence and neutrality suggest that we all must commit ourselves to working to restore civility to public discourse. When we stop respecting one another, when we denigrate one another, when we malign the motives of those with whom we

disagree, we lose the ability to communicate – even argue – with each other civilly and respectfully, a state of affairs that has been discussed often in the past, but which I believe now has reached a crisis point.

So what other actions can be taken beyond civics education and trying to restore civility – admittedly long-term goals? You can communicate with your Senators and Representatives and contribute to political campaigns when courts and the judicial function are unfairly attacked, or when unqualified partisans are nominated to the bench. You can explain to your children and grandchildren how they, too, can support these bedrock principles of our democracy so that those principles survive long after we are gone. You can urge everyone you know, young and old, to vote. Participatory democracy is truly the genius of what the Framers envisioned and our subsequent struggles have assured. And the rule of law can only be preserved if all citizens support it through our democratic institutions and, especially, through exercising their right to vote.

Let me be clear as I near the end of these remarks: When I speak of respecting the work of our judiciary and its independence, I am not suggesting in the least that our work should go unexamined. Judges certainly make mistakes, and our decisions must always be open to thoughtful, principled – maybe even harsh – criticism. It comes with the territory, and most of us have thick skins. But it is hard to remember a time when judges, courts, and the judicial branch in general were subjected to so much gratuitous criticism, vitriolic commentary, and purposely misleading attacks.

Still – and this may be the good news – to date I have not seen the work of federal judges being altered by all of this rhetoric. Indeed, at a time when the other two branches of the federal government seem so partisan, polarized, and dysfunctional, a recent study found that the judiciary remains the most trusted of all three branches of government – and by a wide

margin – at least for now. But then again, we judges have several advantages over the two political branches of government. First, the judicial function by definition is neutral, and we have taken a separate judicial oath to administer justice without respect to persons and to do equal right to the poor and to the rich, to make decisions irrespective of the popular will or the cultural or social mores of the time. Second, the judicial branch is the only branch of government that is transparent; it operates almost exclusively in the open, in public courtrooms and through published opinions, not behind closed doors – and with all parties being heard in a fair and open process before decisions are made. Finally, unlike the other two branches of government, the courts are charged with making decisions grounded in facts – never on alternative facts. We trial judges make our decisions based on evidence developed through “testing in the crucible of cross-examination,” which, as Wigmore said, is “the greatest legal engine ever invented for the discovery of truth.” The courts of appeals and the Supreme Court in turn are to rely on those factual records developed through the adversarial process as they apply the law to the found facts and reach their legal conclusions.

So even after all I have described, and the cynicism that even we judges can feel at times, I remain confident that we will stay committed to doing our jobs, preserving and being true to what has been called the “judicial culture in this country.” Jon Meacham said recently: “This is unquestionably a dispiriting time. The story of American history, though, is that we repeatedly overcome such dispiriting moments.” It is my fervent hope that the judiciary under attack will overcome this moment in time as well. Tom Flannery would want as much, I’m sure.